PP

v.

TAN KIM PIOW

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
RICHARD MALANJUM JCA
NIK HASHIM JCA
[CRIMINAL APPEAL NO: N-05-18-1999]
13 JULY 2006

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1) - Trafficking in cannabis - Appeal against acquittal of accused at close of prosecution's case - Whether accused had mens rea possession - Whether prosecution had made out a prima facie case - Whether charge ought to be amended to one of possession under s. 6 read with s. 39A(2)*

The respondent/accused was charged for trafficking 442.9 grams of cannabis, an offence under s. 39B(1) of the Dangerous Drugs Act 1952 ('the Act'). He was acquitted at the close of the case for the prosecution. The Public Prosecutor appealed against the acquittal, submitting that: (i) the presumption under s. 37(g) of the Act may be invoked in this case; and (ii) this case should be remitted for defence to be called on the original charge of trafficking.

Held (allowing the appeal)
Per Gopal Sri Ram JCA:

(1) Independent of any presumption, there was sufficient evidence led by the prosecution from which a strong inference that the accused had knowledge of the drug and that it was in his exclusive physical possession may be drawn. And exclusive possession was a *sine qua non* in a case of this nature. The facts proved in the instant case led to the irresistible inference that the accused was aware of his possession; he knew the nature of the drug he possessed and he had the power of disposal over it. In other words, the accused had *mens rea* possession. (paras 10 & 11)

(2) The prosecution having made out a *prima facie* case, it was for the accused to give a plausible explanation that would rebut the irresistible inference raised against him and thereby create a reasonable doubt in the mind of the court as to whether he had *mens rea* possession. The prosecution case, at its highest, did not even remotely support the charge of trafficking for all that was proved here were the elements of passive *mens rea* possession. To constitute trafficking under s. 39B(1) of the Act, there must be *mens rea* possession accompanied by some overt act; mere passive possession was insufficient. (paras 12 & 13)

[Case remitted to High Court with a direction to call upon accused to make his defence on amended charge of possession under s. 6 read with s. 39A(2) of the Act.]

Bahasa Malaysia *translation of headnotes*

Responden/tertuduh dituduh mengedar 442.9 gram cannabis, satu kesalahan di bawah s. 39B(1) Akta Dadah Berbahaya 1952 ('Akta'), tetapi dibebaskan di akhir kes pendakwaan. Pendakwa Raya merayu terhadap pembebasan dan mengemukakan hujah bahawa: (i) anggapan di bawah s. 37(g) Akta boleh digunakan dalam kes ini; dan (ii) tertuduh seharusnya dipanggil untuk membela diri atas pertuduhan asal pengedaran.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR:

(1) Tanpa bergantung kepada anggapan pun, terdapat keterangan yang mencukupi di mana andaian kukuh boleh dibuat bahawa tertuduh mempunyai pengetahuan tentang dadah dan bahawa dadah berada dalam milikan fizikal ekslusifnya. Milikan ekslusif adalah *sine qua non* dalam kes-kes seperti ini. Fakta-fakta yang dibuktikan telah membangkitkan andaian bahawa tertuduh sedar tentang milikannya; beliau juga tahu tentang sifat dadah dalam milikannya serta mempunyai kawalan atas pelupusannya. Dengan kata lain, perayu mempunyai *mens rea* pemilikan.

(2) Sebaik pendakwaan berjaya membangkitkan kes *prima facie*, menjadi tanggungjawab tertuduh untuk memberi penjelasan munasabah bagi menyangkal andaian kukuh yang berbangkit terhadapnya sekaligus membangkitkan keraguan munasabah berkaitan sama ada beliau mempunyai *mens rea* pemilikan. Kes

A pendakwaan, pada tahap terbaiknya, tidak mampu menyokong tuduhan pengedaran kerana apa yang dibuktikan hanyalah elemen-elemen pasif *mens rea* pemilikan. Bagi membuktikan pengedaran di bawah s. 39B(1) Akta, harus wujud *mens rea* pemilikan diikuti dengan suatu perlakuan yang jelas; pemilikan
B pasif adalah tidak memadai.

[Kes dikembalikan ke Mahkamah Tinggi dengan arahan untuk memanggil tertuduh membela diri atas pertuduhan terpinda pemilikan di bawah s. 6 dibaca dengan s. 39A(2) Akta.]

C **Case(s) referred to:**
Chan Chwen Kong v. PP [1962] MLJ 307 ***(refd)***
Choo Yoke Choy v. PP [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43 SC ***(refd)***
Chua Beow Huat v. PP [1970] 2 MLJ 29 ***(refd)***
D *Mohamad Yazri Minhat v. PP [2003] 2 CLJ 65 CA* ***(refd)***
Om Parkash Bakshi v. State [1989] Cr LJ 1207 ***(refd)***
Ong Ah Chuan v. PP [1981] 1 MLJ 64 ***(refd)***
Saad Ibrahim v. PP [1968] 1 MLJ 158 ***(refd)***
Tay Kah Tiang v. PP [2001] 2 SLR 305 ***(refd)***
E *Wong Nam Noi v. PP [1998] 1 CLJ 37 CA* ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 6, 37(g), 39A(2), 39B(1)
Evidence Act 1950, s. 8

F Penal Code [India], s. 120-B

For the appellant - K Mangai
For the respondent - Muhammad Shafee Abdullah (Kaushalya Rajathurai, Lalitha Nagamuthu, Sarah Abishegam & Badrul Munir Bukhari with him); M/s Shafee & Co

G *[Appeal from High Court, Seremban; Criminal Trial No: 45-3-1998]*

Reported by Suresh Nathan

H **JUDGMENT**

Gopal Sri Ram JCA:

[1] The accused (for that is how we will refer to the respondent) was charged for trafficking 442.9 grams of cannabis,
I an offence under s. 39B(1) of the Dangerous Drugs Act 1952 ("the Act"). He was acquitted at the close of the case for the prosecution. The Public Prosecutor appealed against the acquittal. At the close of arguments, we allowed the appeal and remitted

the case to the High Court with a direction to call upon the accused to make his defence on the amended charge of possession under s. 6 read with s. 39A(2) of the Act. Our reasons now follow.

[2] First, the facts. On 30 June 1997, at about 12.15pm PW10 (Inspector Yusof Abdul) acting on information received by him raided the first floor of premises No. 303 Jalan Seng Meng Lee in Seremban. He was accompanied by a team of six other police personnel. He knocked on the door. It was opened by the accused. PW10 then identified himself as a police officer. At that point, the accused made a sudden attempt to close the door. Nevertheless, PW10 and his team managed to force their way in. The accused then tried to run into the house. But he was apprehended. The accused then led PW10 to a room on the first floor. There were three beds in that room. Two male Chinese were sprawled, one on each of two beds. They appeared to be asleep. The third bed was empty. PW10 woke them. They were startled.

[3] There was a cupboard in the room. In it was a black plastic bag inside which was a red plastic bag. From this PW10 removed a package which contained a substance that he suspected to be a dangerous drug. The substance he recovered was, upon subsequent chemical examination, found to be 442.9 grams of cannabis. The accused and the other two occupants (PW5 and PW6) were arrested. PW5 and PW6 were released and later gave evidence at the accused's trial.

[4] In our judgment, the learned judge overlooked the totality of the circumstantial evidence that was led before him by the prosecution. It is for this reason that he erred in acquitting the accused at the close of the prosecution case. There were, in our view, sufficient facts established by the prosecution based on which a case of passive possession against the accused could *prima facie* be inferred.

[5] First, the drugs were recovered from the cupboard in which clothes that fit the accused were also recovered. Second, on the floor of the room in question was found a registration card and insurance cover note for a motorcycle. Both documents bore the accused's name. Third, the accused had the keys to the room in which the drug was found. Fourth, the accused was the first person to whom the room in question had ever been let. Fifth,

PW5 and PW6 gave evidence that they were mere visitors and had nothing to do with the drug that was found in the cupboard. Neither witness was cross examined on the point. Indeed, it was not put to either of them that the drug belonged to the one or the other. This failure is fatal to the defence on the issue of exclusive occupation of the room by the accused. See, *Chua Beow Huat v. Public Prosecutor* [1970] 2 MLJ 29. In short there was no material on which any inference in the accused's favour could be drawn so as to create a reasonable doubt on the issue of occupancy of the room. It follows that *prima facie* the accused was the sole occupier of the room in which the drug was found. Sixth, there is the accused's conduct when confronted by PW10. His first reaction was to slam the door on the police. His second was to flee the scene.

[6] This contemporaneous conduct of the accused is relevant and admissible by virtue of s. 8 of the Evidence Act 1950. We are aware that in a number of cases it has been said that absconding from the scene is not of itself evidence of guilt. But if you look carefully enough at those cases, you will find that the only real evidence against the accused there was his flight. So you find the editors of *Sarkar's Law of Evidence,* 15th edn saying this:

> Mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. The act is a relevant piece of evidence to be considered along with other evidence but its value would depend upon the circumstances of each case.

[7] In the present case, the conduct of the accused is not to be taken in isolation but together with all the other circumstances of the case. This is the correct approach to circumstantial evidence. As Thomson CJ said in *Chan Chwen Kong v. Public Prosecutor* [1962] MLJ 307:

> That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the conviction. That is very true. It must however be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to form a rope. The real question is: is that rope strong enough to hang the prisoner?

[8] We find the facts of the present case to be much stronger than those of *Om Parkash Bakshi v. State* [1989] Cr LJ 1207. There, some policemen on their beat saw the petitioner and his co-accused arguing about a book. Each was snatching it from the other. When the accused were confronted by the police they became nonplussed. The book was found to contain 110 grams of morphine. The petitioner moved the High Court at Delhi to revise the order of the sessions court to frame a charge under the Narcotic Drugs and Psychotropic Substances Act read with Section 120-B of the Indian Penal Code. In dismissing the petition P.K. Bahri, J said that the facts showed that:

> both the accused were in possession of the book containing the morphine and both were nonplussed when confronted by the police. So, from this circumstance a *prima facie* view can be taken that both the co-accused were having the knowledge that the book contained the morphine.

[9] We now turn to two arguments addressed to us by the deputy who argued this appeal. In support of the appeal, she referred us to the presumption under s. 37(g) of the Act which she said may be invoked in this case. That section reads as follows:

> (g) if any dangerous drug is found to be concealed in any premises, it shall be presumed, until the contrary is proved, that the said drug is so concealed with the knowledge of the occupier of the premises.

[10] We find it unnecessary to deal with this argument. In our judgment, independent of any presumption there is sufficient evidence led by the prosecution from which a strong inference that the accused had knowledge of the drug and that it was in his exclusive physical possession may be drawn. And exclusive possession is a *sine qua non* in a case of this nature. See, *Choo Yoke Choy v. Public Prosecutor* [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43.

[11] At the risk of repetition, we would observe that the facts proved in the present instance lead to the irresistible inference that the accused was aware of his possession; he knew the nature of the drug he possessed and he had the power of disposal over it. In other words the accused had *mens rea* possession. See, *Saad Ibrahim v. Public Prosecutor* [1968] 1 MLJ 158. We would here

A emphasise that knowledge like other states of mind is a fact that is to be inferred from surrounding circumstances. See, *Wong Nam Noi v. Public Prosecutor* [1998] 1 CLJ 37; *Tay Kah Tiang v. Public Prosecutor* [2001] 2 SLR 305.

B **[12]** The prosecution having made out a *prima facie* case, it is for the accused to give a plausible explanation that would rebut the irresistible inference raised against him and thereby create a reasonable doubt in the mind of the court as to whether he had *mens rea* possession.

C **[13]** The learned deputy also made a rather diffident second submission that we should remit this case for defence to be called on the original charge of trafficking. However, under pressure of argument she quite rightly retreated from the position she originally took. We must make it abundantly clear that taking the D prosecution case at its highest does not even remotely support the charge of trafficking. For, all that was proved here were the elements of passive *mens rea* possession. To constitute trafficking under s. 39B(1) of the Act, there must be *mens rea* possession E accompanied by some overt act: mere passive possession is insufficient. See, *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64; *Mohamad Yazri Minhat v. Public Prosecutor* [2003] 2 CLJ 65.

[14] For the reasons already given, we allowed the appeal and made the appropriate orders.

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